BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	DA 04-3185, 3186, 3187
	)	

COMMENTS OF VOICE MAIL SMART REPLY, INC.

I. INTRODUCTION

Smart Reply, Inc. (SRI) is a company which provides marketing services to national retail clients aimed at enhancing consumer loyalty and retaining customers. SRI at all times requires that its clients respect customers' privacy, including honoring "do-not-call" requests. SRI ensures all its messages comply with the restrictions of the Telephone Consumer Protection Act and its accompanying Regulation.

SRI submits these comments to urge the Commission to preempt differing state laws purporting to restrict interstate recorded telephone calls, including North Dakota's restrictions. Consumers and SRI clients are better served by a uniform scheme of regulation of interstate telephony. State regulators, of course, remain free to enforce the federal standards in cooperation with the FCC.

II. COMMENTS

1. **DA04-3185:** The FCC should preempt New Jersey's definition of "established business relationship" as applied to interstate telephone calls, as well as other differing state definitions of "established business relationship" and/or those states which do not include an exemption for established customers from their "do-not-call" lists.

New Jersey is one of 39 states[1] which have adopted a state law definition of "established

[1] Alabama (Al. Code § 8-19A-3(19)); Alaska (Alaska Code § 45.50.475(g)(3)(B)(v)); Arkansas (Ark. Code § 4-99-403 (5)); California (Cal. Bus. & Prof. Code § 17592(e)(4)); Colorado (C.R.S. 6-1-903(7)); Connecticut (Conn. Gen. Stat. § 42-288a(9)(c)); Florida (Fla. Stat. § 501.059(1)(c)(3)); Georgia (Ga. Code § 46-5-27(b)(3)(B)); Idaho (2004 ID H.B. 535 § 1); Illinois (815 ILCS 402/5(b)); Indiana (Ind. Code §24-4.7-1-1); Kansas (K.S.A. § 50-670(a)(6)); Kentucky (K.R.S. § 367.46951(2)(c); Louisiana (La. Rev. Stat. 45:844.12(4)(c)); Maine (32 Me. Code § 14716); Massachusetts (Mass. Gen. Laws, Ch. 159C, § 1); Michigan (Mich. Comp. Laws § 445.111(j)); Minnesota (Minn. Stat. § 325E.311 (6)(2)); Mississippi (Minn. Stat. § 325E.311 (6)(2)); Missouri (R.S. Mo. § 407.1095(3)(b)); Montana (Mont. Code 30-14-1601(4)(b)); Nevada (Nev. Stat. § 228.530(3)(b)); New Hampshire (N.H. Code § 359-E:7(V)); New Jersey (N.J. Reg. 13:45D-4.4); New Mexico (N.M. Stat. § 57-12-22(D)(1)); New York (21 NYCRR § 4603.2(b)); North Carolina (N.C. Gen. Stat. § 75-101(5)); North Dakota (N.D. Code § 51-28-01(4)); Oklahoma (15 Ok. St. 775B.2(3)); Oregon (O.R.S. § 646.569(2)(b)); Pennsylvania (73 P.S. § 2242); South Dakota (S.D. Stat. § 49-

business relationship" applicable to telemarketing. These definitions apply to state "do-not-call" lists, disclosure rules, curfew rules and many other aspects of how SRI provides services to its clients in those states.

Although the FCC has previously expressed its opinion that these state rules do not apply to interstate telephone calls, several states have attempted to apply their restrictions despite earlier FCC opinions[2].

These statutes conflict with the Commission's definition of "established business relationship" and the similar FTC definition of "established business relationship." The FCC should now preempt these definitions as applied to interstate calls consistent with its statement in July, 2003, that businesses should not be subject to multiple, conflicting legislative schemes. Because these definitions frustrate the federal scheme they should be preempted.[3]

2. **DA04-3186:** The FCC should preempt state "do-not-call" lists which do not allow an exemption for calls to a business's established customers.

In a related issue, the Commission should preempt state "do-not-call" lists which do not allow businesses to communicate with their existing customers. As set forth in the July 3, 2003, Order, the FCC concluded that an "established business relationship" exemption is necessary to allow companies to communicate with their existing customers." Report & Order, ¶ 112.

SRI's clients use SRI's services solely to communicate with their existing customers. Customers should not be forced to make an "all or nothing" choice between adding their name to a state "do-not-call" list to prohibit all calls of a commercial nature to them, or allowing all such calls. The federal rule allowing businesses to contact their own customers based on the definition of "established business relationship" strikes balance between the "all or nothing" approach adopted by several states.

31-1(32)(c)); Tennessee (Tenn. Code Ann. § 64-4-401(6)(B)(iii)); Texas (Tex. Bus. & Com. Code § 43.002(4); 16 TAC 26.37(c)(2)); Utah (Utah Code 13-25a-102(4)); Vermont (9 V.S.A. 2464a(a)(7)(B)(iv)); Virginia (Va. Code § 59.1510); Wisconsin (Wis. Stat. § 100.52(6)(b)); Wyoming (Wyoming Code § 40-12-301(a)(vi)).

[2] For example please see the March 3, 1998 letter from Geraldine Matise, Chief, Network Services Division, to Mr. Sanford L. Schenberg, which stated that "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and commissioned regulations, enacted pursuant to this TCPA, govern interstate commercial telemarketing calls in the United States." *See also*, letter, January 26, 1998, Matise to Delegate Ronald A. Guns.

[3] This ruling would be consistent with the findings of Congress adopted upon passage of the TCPA (e.g. ". . . states do not have jurisdiction over interstate calls" 102 Senate Report 177, pg. 3) and rulings of several federal circuits repeating this language. Nicholson v. Hooters of Augusta, 136 F.3d 1287, 1288 (11th Cir. 1998); International Science Technology Institute, Inc., v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Chair King, Inc., v. Houston=s Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997); Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995). But see, Van Bergen v. State of Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995) (state law application to intrastate calls using recordings is not preempted.)

Currently several states do not allow an "inquiry" exemption to their "do-not-call" list and one state contains no exemption for calls to established customers exempting only calls regarding transactions not yet completed. In. Code § 24-4.7-1-1.

Because consumers can make individual company-specific "do-not-call" requests, the federal regulation allows consumers to protect their own privacy while still enabling businesses to communicate with existing customers regarding items of interest to those customers.

The FCC should therefore preempt state "do-not-call" lists which conflict with and/or differ from the federal scheme as applied to interstate telephone calls.

The FCC has recognized that recorded voice messages are an important means of communication in certain circumstances. Report & Order, July 3, 2003, ¶ 136, et seq. School sickness notifications, notifications that an item ordered is in stock, nonprofit messages, such as a need for a given blood type, and commercial messages to a business's customers have all been shown to be welcome and proven means of communication. Each of these messages is allowed pursuant to the current FCC regulations, 47 CFR § 64.1200(a)(2), so long as compliant with other restrictions.

Several states, including North Dakota, however have implemented state laws differing from this federal regulation regarding this medium. The FCC should preempt North Dakota's rules regarding delivery of recordings as well as other states' rules to the extent they conflict with federal regulation.

3. **DA04-3187:** The FCC should preempt North Dakota's rules regarding delivery of recordings as well as other states which impose restrictions different than those found in the TCPA and accompany Regulation.

North Dakota is one of several states which apply different restrictions to the delivery of recorded voice messages other than the standard set forth in the TCPA and its Regulation. 47 CFR § 64.1200(a)(2). SRI and its clients have determined that these messages can be valuable means of contacting customers regarding items of interest or situations such as need for a given blood type, school snow days, etc.

The Commission has recognized that these messages can be valuable to consumers in similar situations.

Further, there is an important safe guard built into the restriction that commercial calls are allowed only if there is an established business relationship between the caller and the receiving consumer. A business is very protective of its customers and will limit its activity to preserve and foster that relationship.

A primary goal of SRI services is built brand loyalty through well crafted messages designed to improve the relationship between our clients and their customers.

Based on our research, at least 8 states[4] do not allow calls by a business using a recorded message to its established customers. Some of these states have purported to apply these restrictions to interstate calls despite statements by the FCC that these statutes do not apply.

The Federal Communications Commission should take this opportunity to apply its uniform standard to these messages allowing and regulating the calls as per the TCPA Regulation by preempting state laws which impose differing restrictions on telephone calls which contain recorded voice messages.

III. CONCLUSION

SRI urges the Commission preempt state law as applied to interstate telephone calls based on the clear intent of Congress to establish a national regulatory scheme and the interests of consumers, businesses and regulators in such a uniform scheme.

Please contact me if you have further questions.

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Dave Savage
President, Smart Reply, Inc.

[4] Arizona (Ar. Stat. § 14-1278); Arkansas (Ark. Code § 5-63-204); Colorado (C.R.S. § 8-9-311); Florida (Fla. Stat. § 51.059); Georgia (Ga. Code § 46-5-23); Washington (Wa. Rev. Stat. § 80.36.400); Wisconsin (Wis. Stat. § 100.52); Wyoming (Wy. Code § 6-6-104).